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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1087.

THE UNITED STATES, APPELLANT,

vs.

ANNIE M. LA TOURRETTE, EXECUTRIX OF JAMES A. M. LA TOURRETTE, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 23, 1893.

(15471.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1087.

THE UNITED STATES, APPELLANT,

vs.

ANNIE M. LA TOURRETTE, EXECUTRIX OF JAMES A. M. LA TOURRETTE, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

JAMES A. M. LA TOURRETTE
vs.
THE UNITED STATES. } 16746.

I. Petition.—Filed April 24, 1890.

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner, James A. M. La Tourrette, respectfully represents: That he is a citizen of the United States and an officer of the United States Army, at present holding the position of post chaplain therein; that he has at all times borne true allegiance to the United States and has not at any time nor in any way aided, abetted, or given encouragement to rebellion against the United States; that he has served continuously on the active list as a chaplain at a post and a post chaplain in the United States regular Army from February 6, 1865, to the presen time, and always faithfully discharged the duties by law imposed upon him as a said chaplain, having first received due appointments to the positions of a said chaplain, and having duly accepted the said appointments with all
2 their duties and responsibilites; that from February 6, 1885, to April 27, 1887, he served in the said Army as a commissioned officer; that on said February 6, 1885, he completed twenty years of service in the United States Army and thereafter was entitled, under section 1262 of the United States Revised Statutes, to four (4) longevity allowances, that is to say, one for each term of five years of service; that all of said time of twenty (20) years was actual time of service in the Army and was computable, on his commission, for longevity allowances, service pay, or "additional pay to officers for length of service," also under the following legislative clause:

"Additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the Army * * * shall be allowed all officers in computing their pay." (Sec. 21, Stat. L., 346, ch. 79, and 22 Stat. L., 117, ch. 254; App'n acts of years 1882 and 1883.)

That, during the said period of time, from February 6, 1885, to April 27, 1887, he was paid his graded or foundation pay of fifteen hundred dollars $1,500.00) per annum, with only three longevity allowances, and that the remaining one, his fourth longevity allowance, yet remains unpaid, and is of the value of just ten per centum on his then said graded pay of fifteen hundred dollars ($1,500.00) per annum, and amounts, in said period, from February 6, 1885, to April 27, 1887, to three hundred and thirty-three dollars and seventy-five cents ($333.75); that there has been no action on this claim by Congress or any Executive Department; that there has been no assignment or transfer of this claim or any part thereof or interest therein, and that the United States are justly indebted
3 to your petitioner for the whole amount claimed, three hundred and thirty-three dollars and seventy-five cents ($333.75) over and above all just credits and offsets.

Your petitioner demands judgment against the United States for the sum of three hundred and thirty-three dollars and seventy-five cents ($333.75).

JOSEPH W. STRYKER,
Attorney for Plaintiff.

Post-office address: No. 1305 E street NW., Washington, D. C.

UNITED STATES OF AMERICA,
State of Indiana, ss:

Petitioner, James A. M. La Tourrette, being duly sworn, says that he has read the foregoing petition and believes the averments therein contained are true.

(I was retired from active service on March 23, 1890.)

JAMES A. M. LA TOURRETTE,
Post Chaplain, U. S. Army.

Sworn to and subscribed before me this 12th day of April, 1890, at Indianapolis, State of Indiana, as witness my hand and seal.

[SEAL.] FRANK L. FOSTER,
Notary Public, Marion County, Indiana.

4 *II. Traverse.—Filed May 3, 1890.*

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

5 *III. Motion substituting executrix.—Filed and allowed April 15, 1892.*

And now comes the claimant by his attorney and moves the court that Annie M. La Tourrette be admitted to prosecute this suit, the said James A. M. La Tourrette having died on the 23d of September, 1891, and as appears by a duly authenticated copy of the record filed in this case, the said Annie M. La Tourrette having been duly appointed his executrix.

JOSEPH W. STRYKER,
Atty. for Claimant.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice.

6 IV. *Findings of fact as finally amended,—Filed by the court November 27, 1893.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

February 6, 1865, claimant was elected and appointed chaplain for the post at Fort Columbus, New York Harbor, under the provisions of section 18 of the act of July 5, 1838, and the supplementary acts, July 7, 1838, section 2; March 2, 1849, section 3, and February 21, 1857, section 2.

II.

Claimant served as post chaplain under his appointment by the post council until commissioned post chaplain U. S. Army under the provisions of the act of March 2, 1867, section 7. Under this act he was nominated to the Senate for appointment as post chaplain March 18, 1867; was confirmed by the Senate April 3, 1867; and was commissioned accordingly by the President April 6, 1867, to rank from April 3, 1867.

He formally accepted the appointment April 27, 1867.

III.

Claimant was retired from active service as post chaplain March 23, 1890, under the act of June 30, 1882. He held no commission as an officer of the Army prior to the one issued to him by the President April 6, 1867.

IV.

Claimant was paid at the rate of $1,500 per annum with 30 per cent increase for fifteen years' service from February 6, 1885, to April 26, 1887, and at the rate of $1,500 per annum with 40 per cent increase for twenty years' service from April 27, 1887, as follows:

7

Amount paid for the whole of the month of February, 1885		$162.50
Proportion for the period from the 6th to the end of the month, $\frac{25}{30}$ of $162.50		135.41
Amount paid for the period from March 1, 1885, to March 31, 1887, twenty-five months, at $162.50 per month		4,062.50
Amount paid for the whole month of April, 1887, at $1,500, and 30 per cent increase	$162.50	
Forty per cent increase from April 27 to 30	1.64	
	164.14	
Proportion for period from April 1 to April 27, viz, $\frac{25}{30}$ of $162.50 and $\frac{2}{3}$ of 1.64		141.24
Total amount paid		4,339.15

V.

Claimant has been paid as post chaplain as follows:

From July 1, 1870, to February 6, 1875, at the rate of $1,500 per annum, with 10 per cent increase for five years' service.

From February 7, 1875, to February 6, 1880, at the rate of $1,500 per annum with 20 per cent increase for ten years' service.

From February 7, 1880, to April 26, 1887, at the rate of $1,500 per annum, with 30 per cent increase for fifteen years' service.

From April 27, 1887, to March 23, 1890, at the rate of $1,500 per annum, with 40 per cent increase for twenty years' service.

VI.

In his first service he received no commission. It does not appear that he was required to take an oath of office. His employment was not for any fixed or definite time. He was paid for service on certificate of post commander. He was not borne on army register prior to 1867.

In the registers from 1867 to 1878, inclusive, Chaplain La Tourette's name appears with the date of his "original entry into service" given as April 3d, 1867. The registers from 1879 to 1881, inclusive, refer to that date as the "date of commission," and contain a record of service as follows, viz:

8 "La Tourette, James A. M., Apr. 3, '67. (Born in N. Y.; apptd. from N. Y.)

"Chap. post of Fort Columbus, N. Y. H., Feb. 6, '65, to Apr. 27, '67; post chap. Apr. 3, '67; acc. Apr. 27, '67."

In the Registers for 1882 and succeeding years in the column headed "Service in the Army," "In permanent establishment," this entry appears opposite Chaplain La Tourette's name, "chap. (act 5 July 38) 6 Feb. '65; post chap. 3 Apr. '67; accepted 27 Apr." His service as chaplain under the act of July 5, 1838, together with his services as post-chaplain under the act of March 2, 1867, was continuous and without interruption from February 6, 1865, to the 23rd of March 1890.

VII.

Crediting the decedent for the time from the 6th of February, 1865, to April 26, 1867, the longevity pay of decedent is the sum of $333.75 more than he has received.

VIII.

The action of the council of administration was approved by the Secretary of War, and his appointment or employment as post-chaplain was subsequently announced in War Department orders, reading, to wit:

SPECIAL ORDERS, No. 237.

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, May 19, 1866.

[Extract.]

* * * * * * *

7. Fort Columbus, New York Harbor, is announced as a chaplain-post, to date from February 6, 1865, in place of Fort Wood, New York Harbor, discontinued as such from that date.

8. The Reverend James A. M. La Tourette is announced as post-chaplain to Fort Columbus, New York Harbor, from February 6, 1865. He will, in connection with his present duties as Fort Columbus, perform also those of Fort Wood, as heretofore.

* * * * * * *

By order of the Secretary of War.

E. D. TOWNSEND,
Assistant Adjutant-General.

9 CONCLUSION OF LAW.

Upon a re-examination of the statutes, a majority of the court are of the opinion that the decedent, during his service from February, 1865, to April 26, 1867, was in the Army of the United States within the meaning of the law and determines that the claimant is entitled to recover the sum of three hundred and thirty-three dollars and seventy-five cents ($333.75).

10 V. *Judgment of the court.—Entered November* 27, 1893.

ANNIE M. LA TOURRETTE, EXR. OF JAMES A. M. La Tourrette, decd., *vs.* THE UNITED STATES. } 16746.

At a Court of Claims, held in the city of Washington on the 27th day of November, A. D. 1893, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Annie M. LaTourrette, executrix of James A. M. La Tourrette, deceased, do have and recover of and from the United States the sum of three hundred and thirty-three dollars and seventy-five cents ($333 $\frac{75}{100}$).

BY THE COURT.

11 VI. *Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 27th day of November, 1893, in favor of claimant, the defendants, by their Attorney-General, on the 19th day of December, 1893, make application for and give notice of an appeal to the Supreme Court of the United States.

J. E. DODGE,
Asst. Attorney-General,
Per CONWAY ROBINSON,
Assistant Attorney.

Filed December 19, 1893.

Allowed in open court Dec. 19, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.

12 In the Court of Claims.

ANNIE M. LA TOURRETTE, EXECUTRIX OF JAMES A. M. La Tourrette, dec'd,
vs.
THE UNITED STATES. } No. —.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, the judgment of the court, and the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 22d day of December, 1893.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 15471. Term No. 1087. The United States, appellant, *vs.* Annie M. La Tourrette, executrix of James A. M. La Tourrette, deceased. Filed December 23d, 1893. Court of Claims.

Office Supreme Court U. S.
FILED.
JAN 17 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

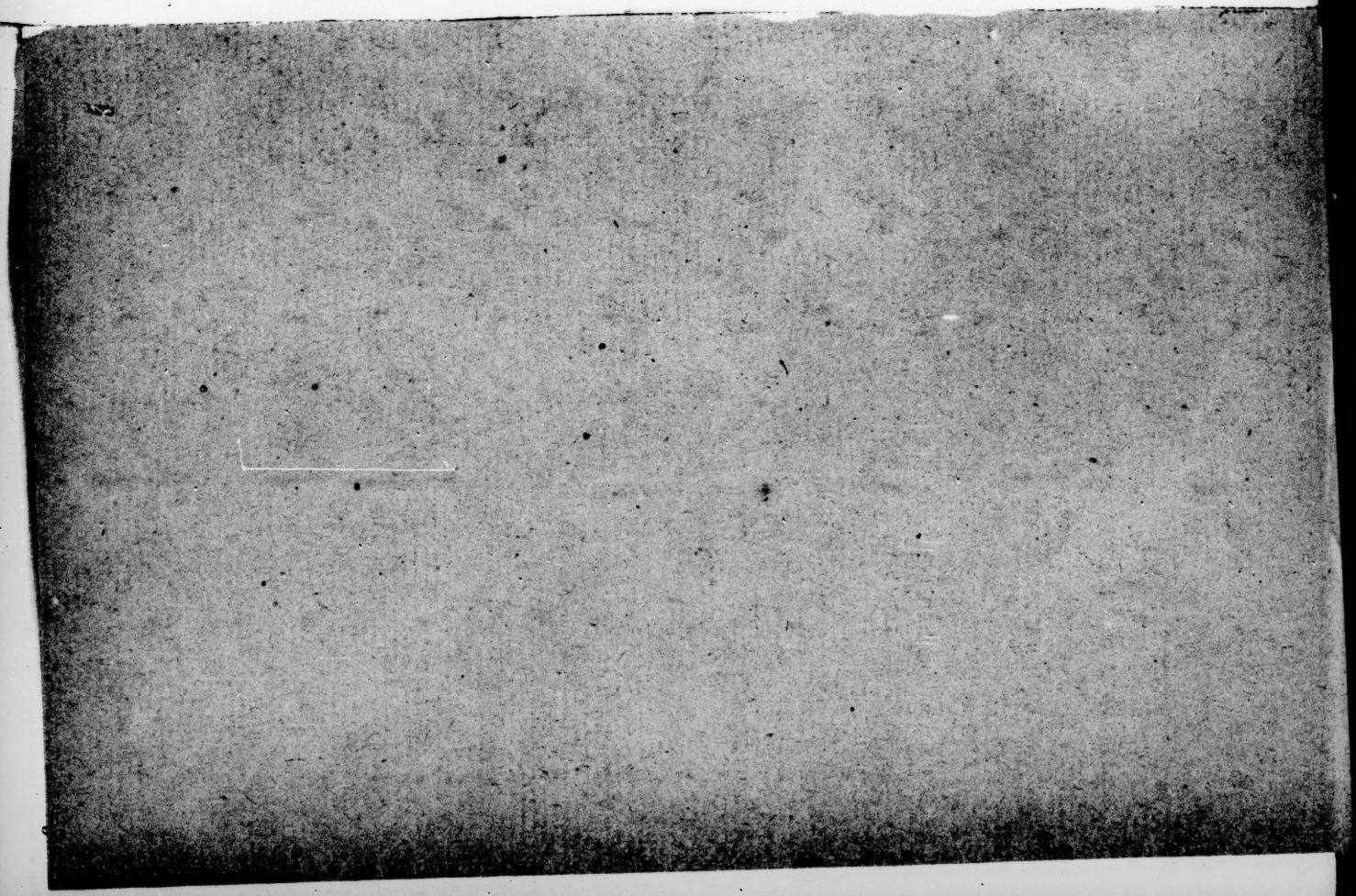
THE UNITED STATES, APPELLANT,
vs.
ANNIE M. LA TOURRETTE, EXECUTRIX of James A. M. La Tourrette, deceased.
No. 1087.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

CHARLES C. BINNEY,
Assistant Attorney.

J. E. DODGE,
Assistant Attorney-General.



In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, APPELLANT,
vs.
ANNIE M. LA TOURRETTE, EXECUTRIX of James A. M. La Tourrette, deceased. } No. 1087.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

I. STATEMENT OF THE CASE.

The appellee's testator, the late Rev. James A. M. La Tourrette, was, on February 6, 1865, employed by the council of administration of the post at Fort Columbus, New York Harbor, as chaplain and schoolmaster for that post under the act of July 5, 1838, § 18 (5 Stats., 259), and the supplementary acts of July 7, 1838 (5 Stats.,

308), March 2, 1849, § 3 (9 Stats., 351), and February 21, 1857, § 2 (11 Stats., 163). (Record, p. 3.)

Mr. La Tourrette served as such post chaplain until April 27, 1867, when he accepted a commission from the President (dated April 6, 1867) as a post chaplain of the United States Army, under the act of March 2, 1867, § 7 (14 Stats., 423), to rank from April 3, 1867. (Record, p. 3.)

Prior to the act of March 2, 1867, the names of post chaplains did not appear in the Army Register, nor does it appear that any oath of office was required of them. (Record, p. 4.)

Mr. La Tourrette served as commissioned post chaplain until March 23, 1890, when he was retired from active service. From July 1, 1870, he received longevity pay (under the act of July 15, 1870, § 24, reënacted as R. S. § 1262) for five years' service; from February 7, 1875, for ten years' service; and from February 7, 1880, for fifteen years' service. From April 27, 1887, twenty years from the acceptance of his commission, he received longevity pay for twenty years' service. The petition in this case was filed to recover the fourth increase of longevity pay, claimed to be due from February 7, 1885, to April, 26, 1887, inclusive. Mr. La Tourrette having died since the suit began, his executrix was substituted as claimant. The Court of Claims gave judgment for the claimant for $333.75, being the amount claimed for that period above mentioned as the fourth increase of longevity pay. From this judgment the United States appealed, the appeal being allowed December 19, 1893. (Record, pp. 3, 4, 5.)

II. ASSIGNMENTS OF ERROR.

The Court of Claims erred—

1. In holding that the late Rev. James A. M. La Tourrette served in the army of the United States within the meaning of Revised Statutes, section 1262, from February 6, 1865, to April 26, 1867, inclusive, so that that period should have been counted as a part of his years of service in computing longevity pay.

2. In not holding that the said La Tourrette was during the said period a civilian employed by the council of administration of the post at Fort Columbus to perform the civil duties of chaplain and schoolmaster at that post.

3. In entering judgment for the appellee for the sum of $333.75.

III. BRIEF OF ARGUMENT.

The question to be decided is whether a chaplain appointed for a post under the act of July 5, 1838, and its supplements, served in the United States Army within the meaning of the longevity pay acts, so as to be entitled, after being commissioned a post chaplain under the act of March 2, 1867, to compute the time when he was employed under the former act as a part of his military service, for the purpose of receiving longevity pay. It is submitted, in behalf of the appellee, that under the act of 1838 a post chaplain was merely a person employed by the council of administration to perform religious duties and to teach, but did not serve in the army of the United States.

The legislation in regard to chaplains at posts, prior to March 2, 1867, is as follows:

> It shall be lawful for the officers composing the council of administration at any post, from time to time, to employ such person as they may think proper to officiate as chaplain, who shall also perform the duties of schoolmaster at such post, and the person so employed shall, on the certificate of the commanding officer of the post, be paid such sum for his services, not exceeding forty dollars per month, as may be determined by said council of administration, with the approval of the Secretary of War; and in addition to his pay the said chaplain shall be allowed four rations per diem with quarters and fuel. (Act of July 5, 1838, §18, 5 Stats., 259).
>
> The posts at which chaplains shall be allowed shall be limited to the number of twenty, and shall be first approved by the Secretary of War, and shall be confined to places most destitute of instruction. (Act of July 7, 1838 (5 Stats., 308.)
>
> That the provisions of the act of 1838 be, and hereby are, extended so as to authorize the employment of ten additional chaplains for military posts of the United States. (Act of March 2, 1849, § 3, 9 Stats., 351.)
>
> That the Secretary of War be authorized, on the recommendation of the council of administration, to extend the additional pay herein provided [*i. e.*, $20 per month increase, allowed to commissioned officers] to any person serving as chaplain at any post of the army. Act of February 21, 1857, § 2 (11 Stats., 163).

The act making all chaplains commissioned officers was as follows:

> The post chaplains now in service, or hereafter to be appointed, shall be commissioned by the President,

> and all vacancies occurring in the grade of chaplain, which is hereby established to rank as captain of infantry, shall be filled by the President, by and with the advice and consent of the Senate, and all army chaplains shall hereafter be on the same footing as to tenure of office, retirement, allowances for service, and pensions, as now provided by law for other officers of the army. (Act of March 2, 1867, § 7, 14 Stats., 423).

The statutes regarding longevity pay are as follows:

> There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, 10 per centum of their current yearly pay [the yearly pay of the grade fixed by R. S., §§ 1261, 1264; see act of June 20, 1882, § 1, 22 Stats., 118] for each term of five years of service. (R. S., § 1262.)
>
> The actual time of *service in the army or navy* or both, shall be allowed all officers in computing their pay. (Act of February 24, 1881, § 1, 21 Stats., 346.)

It cannot be doubted, and the appellee does not deny, that the word "service" in section 1262 means service in the United States Army. The act of July 15, 1838, section 15, (5 Stats., 256), provided in terms for longevity rations for length of service "in the army of the United States," and the pay which the act of July 15, 1870, now section 1262, substituted for the rations, was clearly intended to be given for service of the same character exclusively. The act of February 24, 1881, already cited, gives independent proof of this fact, for had not service in the army alone been heretofore regarded in computing longevity pay, there would have been no need to provide that service in the navy should also be taken into account.

The act of July 5, 1838, and its supplements, the provisions of which have been cited at length above, and under which, as the Court of Claims has found, Mr. La Tourrette was appointed, do not impose any military duties upon post chaplains nor invest them with any military character. Under these acts they were simply persons "employed" by the councils of administration to perform the honorable but purely civil duties of chaplain and schoolmaster. The council of administration was not required to employ any chaplain at all, but merely authorized, in case they saw fit to have a chaplain for the post, "to employ such person as they may think proper," and, no term being fixed, the council might obviously, at any time, cease to employ him. Mr. La Tourrette received no commission, and it has not been found that any acceptance of his appointment was required by or made to the War Department. The amount of such a chaplain's pay was fixed by the council, with the approval of the Secretary of War, the maximum only being regulated by statute. He was paid on certificate of the post commander, and not on his own certificate, as an officer was. If the garrison were withdrawn from a post, his employment and pay came to an end. (Army Regulations, 1863, § 1375.) It does not appear that any oath of service to the United States was required of post chaplains, or taken by Mr. La Tourrette and as the *Act of July* 2, 1862 (12 Stats., 502), prescribing the "iron-clad oath" was in force when he was employed, this is additional evidence that he was not regarded as holding an office under the United States Government. In this connection it should be observed that in *Ex*

parte Reed (100 U. S., 13) the taking of an oath binding the party taking it to serve until discharged was held an essential mark of service in the Navy. In short, Mr. La Tourrette was neither commissioned as an officer nor enlisted as a private soldier. He was simply a civil employé, of a higher social position than the forage masters, wagon masters, and paymasters' clerks, whose employment was authorized by sections 10 and 20 of the same act of 1838, or the numerous other civil employés attached to the Army or hospitals in time of actual war, but a civilian equally with these.

The cases of *Morton* v. *United States* (112 U. S., 1) and *Watson* v. *United States* (130 U. S., 80) have no bearing on the present case, as in those the position of cadets as members of the Army was proved by clear statutory enactment.

Equally irrelevant are the cases of *Bennett* v. *United States* (19 C. Cls., 379) and *Gould* v. *United States* (*id.*, 593), relied on by the appellee. The question is not whether Mr. La Tourrette was prior to April, 1867, acting under color of the office of post chaplain, but as to whether post chaplains under the act of 1838 served in the United States Army.

The Court of Claims has seen fit to find that the employment of Mr. La Tourrette as chaplain was approved by the Secretary of War and officially announced by his order. These findings are wholly irrelevant and can not affect Mr. La Tourrette's status in any way, for the reason that no such approval or announcement was authorized by any statute. The only approval which the Secretary of

War was authorized to give in such matters concerned the amount of pay allowed, not the appointment (see act of July 5, 1838, § 18), while the real announcement quoted in Finding VIII is that Fort Columbus is to be a chaplain post, the announcement of Mr. La Tourrette's appointment being purely incidental. No doubt the appointment merited both the Secretary's approval and the consideration indicated by the announcement, but there being no statutory warrant for either they could not strengthen Mr. La Tourrette's position in any way.

The *Act of February* 11, 1847, § 7 (12 Stats., 124), providing for brigade chaplains for the troops in Mexico, appears to follow the act of 1838 in regarding chaplains not as military officers but as civil employés only. It authorizes "the officers composing the councils of administration of the several regiments constituting a brigade * * * to employ some proper person to officiate as chaplain to such brigade" during the war with Mexico. The same act provides "that the chaplains now attached to the regular Army and stationed at different military posts may, at the discretion of the Secretary of War, be required to repair to the Army in Mexico whenever a majority of the men at the posts where they are respectively stationed shall have left them for service in the field, and should any of said chaplains refuse or decline to do this when ordered to do so by the Adjutant-General, the office of such chaplain shall be deemed vacant and the pay and emoluments thereof be stopped."

Here post chaplains are specifically described as persons "attached to" the Army, not as members of it. The

provision for their being ordered to Mexico recognizes their non-military status. Had they belonged to the Army, their refusal to obey an order to repair to Mexico would have been a grave act of disobedience, whereas it was simply treated as the refusal of a free agent to undertake new duties. The vacating of their office in case of refusal was not a punishment, but merely the revocation of a contract for the performance of civil duties, terminable at will, in order to make possible the employment of another person.

The *Act of February* 21, 1857 (11 Stats., 163), similarily accords with the act of 1838, in treating post chaplains as employés of the councils of administration. It authorizes the Secretary of War to extend the additional pay, allowed therein to officers "to any person serving as chaplain at any post," such additional pay to be allowed in any case "on the recommendation" of the council of administration.

The only exception to the uniformity of language in the acts above cited occurs in the title to the act of March 2, 1849, which uses the words "chaplains of the Army of the United States." The body of this act, however, quoted above, only extends the provisions of the act of 1838 "so as to authorize the *employment* of ten additional chaplains for military posts;" it neither makes these chaplains members of the Army nor recognizes their status as in any respect different from what it was under the act of 1838. The title of an act has no enacting power; its utmost effect is in explaining doubtful portions of the body of the act; and if there be any inconsistency between the two, the

latter must rule. (United States *v.* Fisher, 2 Cr., 358; Hadden *v.* Collector, 5 Wall., 107; Holy Trinity Church *v.* United States, 143 U. S., 457, 462.)

After the Mexican war closed, and the services of the brigade chaplains were dispensed with, the chaplains employed at posts became again, as they had been before, the only chaplains (except the chaplain at West Point) in any way connected with the Army. Soon after the outbreak of the rebellion three new classes of chaplains came into existence. These were:

(1) Chaplains of volunteer regiments, appointed by the regimental commanders on the vote of the field officers and company commanders. (Act of July 22, 1861, § 9, 12 Stats., 270.)

(2) Chaplains of regular regiments, appointed "as the President may direct." (Act of August 3, 1861, § 7, 12 Stats., 288.)

(3) Hospital chaplains, appointed by the President with the advice and consent of the Senate. (Acts of May 20, 1862, § 2, and July 17, 1862, § 9, 12 Stats., 404, 595.)

That these chaplains were in the military service of the United States is clear from the section last cited, which provides that all those who were irregularly appointed or unfit for their duties should be mustered out of service. Had they not been in the service already they would have been merely dismissed, not mustered out. That section makes no such provision in the case of post chaplains, but it does require them to reside at the posts, and the language used indicates a well-defined distinction between "chaplains employed at the military posts called 'chaplain

posts'" and "chaplains in the regular or volunteer service [also called "chaplains in the Army and volunteers"] or army hospitals." The latter classes were in the service; the first comprised merely persons "employed." The duties of the latter classes were necessarily much more active than that of the former and their members many times as numerous. The war brought these classes into existence, whereas it did not in any way change the duties or position of post chaplains. While there was no imperative necessity for excluding the post chaplains from the military service when regimental and hospital chaplains were in that service, yet it was perfectly natural that, there being no change in their duties, their position also should remain unchanged, until 1867, when Congress wisely decided to give them a more honorable status.

The appellee contends, however, that their status had already been changed, and that whatever might have been the position of post chaplains prior to the *Act of April* 9, 1864 (13 Stats., 46), that act recognized them not only as being in the military service of the United States but as having rank therein. It is submitted that a careful consideration of that act and of those preceding it necessitates the conclusion that the act of 1864 did not apply to post chaplains, but to that much larger body which, as already stated, came into existence during the rebellion, viz, the chaplains in the field and in the hospitals.

That act did not bring any chaplains whatever into the military service of the United States. It simply recognized "the rank of chaplain, without command, in the regular and volunteer service of the United States." In

other words, it recognized that all chaplains who were *in the military service* (whether regular or volunteer) of the United States had rank (*i. e.*, were officers), but not command. There is no statement to the effect that all or any class of chaplains shall be recognized as in the military service, still less that any class not previously in such service shall be incorporated into it. The act merely recognized a certain rank as pertaining to such classes of chaplains as were already in the service.

This act of 1864 does, indeed, regulate the duties and privileges of "chaplains," but the nature of these regulations (as to their being borne on the field and staff rolls, wearing uniform, drawing forage for two horses, etc.) shows that only the chaplains already stated to be "in the regular and volunteer service" are meant.

The appellee also relies on the *Act of July* 28, 1866, section 7 (14 Stats., 333). This act provided for "the same number of post chaplains as at present, who shall be appointed as now provided by law," but it did not define their status, which, therefore, remained unchanged. The appellee contends that the words in section 1, "such other forces as shall be provided for by this act," must include post chaplains, because they are mentioned in the act; but the words "other forces" evidently mean something analogous to the bodies previously mentioned in the same sentence (the regiments, and the professors and corps of cadets of the Military Academy), and must refer to the military bands, the engineers, the Quartermaster's, Subsistence, and Ordnance departments, etc. It would be a new use of the word "forces" to include clergymen employed by the councils of administration to act as chap-

lains and schoolmasters at posts, unless by some previous act their enlistment or commission in the Army had been provided for.

The utmost that can be claimed for this act is that it operated to give post chaplains for the first time a status as members of the Army of the United States, although it did not change the manner of their appointment. This view receives some color from section 27 of the same act, establishing post schools, which appear to have previously existed, though not under the regulations of any statute. A person employed as post chaplain acted also as a schoolmaster, and it is conceivable that this act intended that all the instructors in post schools, now for the first time regulated by statute, should be members of the Army. Should the court take this view, then the appellee's fourth increase of longevity pay should have begun from July 28, 1886. At the same time it must be borne in mind that, as will be seen below, the contemporaneous official construction appears to have been the other way.

Lastly, the appellee points to the act of March 2, 1867, section 7 (14 Stats., 423), which provided that thereafter all chaplains should be officers of the Army commissioned by the President, and refers to "the post chaplains now in service." This reference can not fairly be regarded as a recognition of these chaplains as already belonging to the Army. As will be shown below, the contemporaneous official interpretation of the War Department did not so recognize them. The term "in service" is general and would cover civil as well as military employment. It is not equivalent to "in the military service," and even if it were, it would have no retroactive effect as a recognition,

nor make these chaplains members of the Army, except from the date of such recognition, and as they became such by direct enactment in this act, the possible effect of such recognition is immaterial.

The official construction of the statutes regulating the employment of post chaplains prior to 1867 has not been wholly consistent. That which is most nearly contemporaneous, and therefore entitled to the most weight, is found in the Army Registers of 1867 to 1878, inclusive, wherein the date of Mr. La Tourrette's "original entry into service" appears as April 3, 1867. The Army Register being an official publication, this is conclusive evidence that from 1867 to 1878 the War Department did not regard post chaplains appointed under the act of 1838 as having served in the Army, a view which had evidently been taken as long as the act of 1838 was in force, for during that time the names of post chaplains did not appear in the Army Register at all. The Registers of 1879, 1880, and 1881, say nothing about Mr. La Tourrette's original entry into the service, but refer to April 3, 1867, as the date of his commission. The reason for this change is not evident, nor is the change itself sufficient to indicate a change of opinion as to Mr. La Tourrette's status before 1867. The Registers from 1882 until Mr. La Tourrette retired purport to give a record of "service in the Army," both in the volunteers and in the "permanent establishment." In the latter column there appears opposite Mr. La Tourrette's name a reference to his having been a chaplain under the act of 1838, as well as to his subsequent commission. In view of the evidence of official construction given by the prior Registers, the words "serv-

ice in the Army" may be more reasonably interpreted as equivalent to "connected with the Army," rather than as referring to service within the meaning of the longevity pay acts.

The view taken by the Treasury Department was at first more favorable to the appellee. After the longevity pay act of July 15, 1870, was passed, Mr. La Tourrette was paid his first three increments of longevity pay as if he had been serving in the Army prior to his commission in April, 1867. At some period between 1880 and 1885, the Treasury Department took another view, and the fourth increment was held not to be due until twenty years from the day Mr. La Tourrette accepted his commission.

As the War and Treasury Departments have evidently differed in their view of Mr. La Tourrette's status, the case lacks that contemporaneous and uniform executive construction which is regarded as decisive where a statute is ambiguous (*Brown* v. *United States*, 113 U. S. 568; *The Laura*, 114 *id.*, 411); but the construction which holds that Mr. La Tourrette was not in the Army before April 1867, having prevailed contemporaneously and probably uniformly in the the War Department, and having been ultimately adopted by the Treasury as well, is supported by the preponderance of authority.

The whole argument of the appellee, apart from its undue extension of the application of the act of 1864, amounts to this: Congress recognized the regimental and hospital chaplains during the rebellion as not merely in the Army, but as officers; and it subsequently gave all chaplains the rank of a captain of infantry; therefore it could never at any time have intended that any chaplains

should be mere civil employés. This argument overlooks the fact that the importance attached by Congress to the position of chaplain has grown by regular stages. Before 1838 it was not thought worth while to have any chaplains at all. Then the councils of administrations of a few posts were authorized to employ persons to act as chaplain and schoolmaster. Later on the number of these posts was increased and the limit of pay raised. The rebellion, involving large masses of troops in the field, and extensive hospitals, developed a need for many chaplains, whose duties necessarily partook much more of a military character than did those of post chaplains. The former were naturally from the first treated as belonging to the Army, and were eventually recognized as having military rank. These men changed the whole idea of a chaplain's profession, and made the chaplain an essential part of the military system, so that finally all differences between the various kinds of chaplains were abolished, and all alike were commissioned by the President with a definite rank as officers. This growth is clearly established by the several statutes. The appellee's view, it is submitted, is not only inconsistent with the general course of statutory development, but can only be sustained by doubtful interpretations and strained constructions.

The appellant therefore submits that the judgment of the Court of Claims should be reversed.

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Assistant Attorney.

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Assistant Attorney-General.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES,
Appellant,

vs.

ANNIE M. LA TOURRETTE,
Executrix of
JAMES A. M. LA TOURETTE.

No. 1084

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF JOSEPH W. STRYKER,

Attorney for Appellee.

MILANS, LAW PRINTER, 519 7TH STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES,
Appellant,
vs.
ANNIE M. LATOURRETTE,
Executrix of
James A. M. LaTourrette.

No. 1087

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF JOSEPH W. STRYKER, ATTORNEY FOR APPELLEE.

STATEMENT OF THE CASE.

On February 6, 1865, the decedent of the appellee, James A. M. LaTourrette, was elected and appointed chaplain for the post at Fort Columbus, New York Harbor, under the provisions of Sec. 18, of the Act of July 5, 1838 (Stat. 5, p. 256), and the supplementary acts of July 7, 1838, Sec. 2 (Stat. 5, p. 308); March 2, 1849, Sec. 3 (Stat. 9, p. 351); and February 21, 1857, Sec. 2 (Stat. 11, p. 163.)

He served, as so elected and appointed, Chaplain for this military post, under said acts, until he received a commission as post Chaplain, U. S. Army, under the provisions of the Act of March 2, 1867, Sec. 7 (Stat. 14, p. 423), and he formally made acceptance of this Commission on April 27, 1867. His service to the United States as a said Chaplain, under the said act of July 5, 1838, and under the said act of March 2, 1867, was continuous and without interruption from Feb-

ruary 6, 1865, to the time of his retirement on March 23, 1890.

Under the said act of 1867 he was nominated to the Senate for appointment as post-chaplain on March 18, 1867; confirmed by the Senate April 3, 1867, and commissioned accordingly by the President, April 6, 1867, to rank from April 3, 1867; and he held no commission prior to this one issued to him on April 6, 1867.

In the payments made to him of his ten per cent. increment of compensation "for each term of five years of service," under U. S. Revised Statutes, Sec. 1262, his length of service, as to the payment of the first, second, and third of these increments, was computed from the day he began to serve as a chaplain at the post of Fort Columbus, to wit: from February 6, 1865; but, as to the fourth of these increments his length of service was computed from the day he made the formal acceptance of his said commission to wit: from April 27, 1867.

The Court of Claims has found all the above facts as stated, and further, they have found that if it should be determined that the decedent's length of time of service is to be computed, for the purpose of reckoning his said fourth increment of compensation, from February 6, 1865, instead of from April 27, 1867, then he has been short-paid in the interval of time from February 6, 1885 to April 27, 1887, in the sum of $333.75, and that the claimant is entitled to that amount. (See Finding VII, Rec.)

Thereupon the Court of Claims rendered a judgment in favor of the claimant for three hundred and thirty-three dollars and seventy-five cents.

ARGUMENT.

The appellee claims that in reckoning the length of the time of the decedent's prior service, 20 years, after

the end of which his said fourth increment of pay should begin under R. S., Sec. 1262, the said interval of time from February 6, 1865, to April 27, 1867, should be *included*; and the appellant claims it should be *excluded*.

This is the only point for argument in this case, and the appellee bases his contention upon Sec. 24, of the act of July 15, 1870 (Stat. 16, p. 315), carried into U. S. R. S., and reading in Sec. 1262, thereof, viz:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including *chaplains* and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service;"

And upon the following legislative clause, as standing therewith, viz;

"Additional pay to officers for length of service, to be paid with their current monthly pay, and the actual time of service in the army * * * shall be allowed all officers in computing their pay."

(Stat. 21, p. 346; also Stat. 22, p. 117.)

By glancing at the parent act granting increased compensation to officers for length of service; that is to say, the Act of July 5, 1838, Section 15 (Stat. 5, p. 256) reading;

"That every commissioned officer of the line or staff, exclusive of general officers, shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the army of the United States;"

And at the full language of said Sec. 24—fully superceding it—(Stat. 16, p. 315) we can but be made to feel sure that the final word, "service," of R. S. Sec. 1262, *supra*, means service in the army of the United States.

I now propose to demonstrate that the service of the decedent rendered to the United States in the said interval of time, from February 6, 1865, to April 27, 1867, was military and not civil in its character, and that he was even a constituent part of the Army of the United States while he rendered it.

On July 28, 1866, Congress passed an act (14 Stat., 332) entitled "*An act to increase and fix the military peace establishment of the United States,*" reading viz:

SEC. 1. "The military peace establishment of the United States shall hereafter consist of five regiments of artillery, ten regiments of cavalry, forty-five regiments of infantry, the professors and corps of cadets of the U. S. Military Academy, *and such other forces as shall be provided for by this act*, to be known as the *Army of the United States*:"

And the "Chaplains employed at the military posts," 30, in number, were unquestionably "provided for" in the sections numbered 7, and numbered 30 of this act: From the former section I extract viz:

SEC. 7. " * * * and the band at the Military Academy shall be placed on the same footing as other bands, one ordnance and one hospital steward for each military post, and the same number of *post chaplains* as at present authorized, who shall be appointed as now provided by law:" * * *

And from the latter section I cite, viz:

* * * * * * * *

SEC. 30. "That nothing herein contained shall be construed as affecting existing laws respecting the RANK, pay, and allowances of *chaplains of the army*, but the same shall remain as now established by the act entitled 'An act to amend SEC. 9 of the act approved July 17, 1862,' entitled 'An act to define the pay and emoluments of certain officers of the army, and for other purposes,' approved April 9, 1864:"

And of the said section 9, (Stat. 12, p. 594) referred

to in this last section, numbered 30, I extract, viz:

"Sec. 9. That hereafter the compensation of *all* Chaplains in the *regular* or *volunteer* service or army hospitals shall be one hundred dollars per month * * *"

"Chaplains *employed at the military posts called 'Chaplain posts'* shall be required to reside at their posts: and *all* chaplains in the United States service shall be subject to such rules in relation to leave of absence from duty as are prescribed for commissioned officers of the United States Army stationed at such posts:".

And from the act of April 9, 1864 (Stat. 13, p. 46), referred to in this section numbered 30, I extract, viz:

"Sec. 1. That the RANK of *Chaplain* without command in the *Regular* and *Volunteer* service is hereby recognized * * * "

"Sec. 2. That the act approved July 14, 1862, entitled 'An act to grant pensions,' is hereby so amended as to include Chaplains in the *regular* and *volunteer* forces of the army."

and all sections 3 & 4 of this act

Therefore we see that there cannot be any mistake in saying that the decedent, Chaplain James A. M. La Lourrette, was "provided for" in this act of July 28, 1866, and became in virtue of it, after its date, just as certainly and essentially a part of the "Army of the United States" as ever did any other person whom that army contained; and if he was then so *of* the army his service meanwhile must have been service *in* the Army of the United States.

So much may be considered settled; for it will not be regarded that this Court can repeal a law of Congress.

However, just as in the case of the *United States* appellant, vs. *Charles Morton* (112 U. S., p. 1), this Court, though evidently regarding the said act of July 28, 1866, as conclusive, that *Morton's* cadet time of service was in the army after that date (July 28, 1866),

yet went into a history of the growth of the grade of cadet in the army and gave some reasoning to show that his service prior thereto was in the army, that is to say: from July 1, 1865, to July 28, 1866; so I will now, reviewing the statutes, argue—in addition to the above—that Chaplain La Tourrette's service was in the army from February 6, 1865, to July 28, 1866.

The first Chaplain I can find for a military post was provided for in the act of April 14, 1818 (Stat. 3, p. 426), which reads, viz:

"Sec. 2. That there shall be * * * one chaplain, stationed at the Military Academy at West Point, who shall also be professor of geography, history and ethics, with the pay and emoluments allowed the professor of mathematics."

This was his sole authorization and at first no provision is found in law for his rank or commission; his duties were analogous to those of the Chaplains of the Act of 1838; the one was to teach *youthful* and the other *adult* soldiers; and it was never, I believe, doubted in any quarter that he always was a staff officer of the U. S. Army.

Next it was enacted in the Act of July 5, 1838 (Stat. 5, p. 256.)

"SEC. 18. That it shall be lawful for the officers composing the Council of administration at any post, from time to time, to employ such person as they may think proper to officiate as Chaplain, who shall also perform the duties of school-master at such post * * *"

(It may be remarked, here by the way, that it was not an unusual thing for Congress to authorize a "Council of administration" to select and employ a Chaplain of the Army, at an Army post or in the field and that the obvious purpose was to secure, thus, the

services of a Chaplain of the particular denomination whose creed agreed, the most nearly, to the general belief of the persons to whom he had to administer. See the first clause of Sec. 7 of the Act of February 11, 1847–9, Stat. p. 123.)

And then, on July 7, 1838, it was enacted (Stat. 5, p. 308).

"*Second.* The posts at which Chaplains shall be allowed shall be limited to the number of twenty and shall be approved by the Secretary of War * * *;"

Next, on February 11, 1847, it was enacted (Stat. 9, p. 123).

"SEC. 7, * * That the Chaplains now *attached* to the regular Army and stationed at different military posts may, at the discretion of the Secretary of War, be required to repair to the Army in Mexico, whenever a majority of the men at the posts where they are respectively stationed shall have left them for service in the field, and should any of said Chaplains refuse or decline to do this, when ordered so to do by the Adjutant-General, the *office* of such Chaplain shall be deemed vacant and the pay and emoluments thereof be stopped."

Next, on March 2, 1849, an act was passed, entitled:

"*An act to provide for an increase of the Medical staff, and for an additional number of Chaplains of the Army of the United States.*" (Stat. 9, p. 351) which reads;

"SEC. 3. That the provisions of the act of 1838 be, and hereby are, extended so as to authorize the employment of ten additional chaplains for military posts of the United States."

The title of this act was amended by a resolution of the U. S. Senate, passed after the bill was enacted, to read precisely as given above, viz: * * * "For an additional number of chaplains *of the Army of*

the United States." (Senate Journal 30th Congress, 2d Session, page 187.)

Moreover it is to be noted that the act, *supra*, of July 17, 1862, in its Section 9, appellates "all chaplains," which of course includes the chaplains of the act of 1838, "*regular* or *volunteer*," and so do sections one and two of the act, *supra*, of date April 9, 1864; and, of course, this means that the chaplains of the act of 1838 can be only *military*, and not *civilian*, servants of the government. No one ever heard of Congress, or any one else, calling a civil employé "regular or volunteer," or of classifying civil employés respectively as "*regulars and volunteers*."

It is evident from the above cited provisions of law that before July 28, 1866, as well as after that date, Congress regarded the chaplains duly authorized to serve as such under the act of 1838, as rendering a military and not a civil service.

Also it remains to be noted that the act of *April*, 9, 1864, *supra*, reads, viz:

"Sec. 1. The RANK of Chaplain without command * * * is hereby recognized."

If this means anything at all it means that James A. M. La Tourrette held a rank and grade in the U. S. Army in virtue of his authorization to act as Chaplain, set out in the "Findings" of the Court in the Record, to wit:

"War Department, etc."

"Special orders No. 237

* * * * * * * *

8. The Reverend James A. M. La Tourrette is announced as Post Chaplain to Fort Columbus, New York Harbor, from February 6, 1865 * * *"

; and held it from the latter date; and that his appellation of *Chaplain* from that day was his own, and appropriate, *military* title.

His service and position therefore were from that date military and not civil.

"Rank, title * * are the indicia of military and not civil office" (26. C. Claims at page 147):

Nor would it affect the validity of the appellee's demand if it could be shown that his authorizations to serve as Chaplain were not fully as regular as they might be, or that it does not appear that he took as many oaths of office as might in view of regularity be desirable. Pay follows service, and oath-taking is not like it, *per se*, wage-earning; and further, as to the right now claimed I beg to cite:

"In the statutory provisions relating to longevity pay (R. S., Sec. 1262; act of June 18, 1878, and act of June 30, 1882) the word 'service' means actual service performed under color of office without regard to the defects in the title to the office."

"The reward which the statutes intend is for long-continued actual service, and it matters not whether an officer serves as such *de jure* or *de facto*." (Syllabus VII., 19 C. Cl'ms, p. 379.)

"An officer in actual service under color of office, and treated as such by the Executive, is entitled to have the time of his actual service credited to him in the computation of longevity pay." (Syllabus III., 19 C. Cl'ms, p. 593.)

Finally I beg to observe it seems of small moment whether the service of the decedent was always duly and properly stated on the U. S. Army Register or not. These registers are often incomplete; they never did undertake to state the army service of the private soldier, or of the non-commissioned, or of the warrant officer's time of service at all, until he was promoted to a commission; and in stating it then, with the service in which he was commissioned, the words, "original entry into service," quite often have meant only original entry into service *upon a commission*.